

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JAMES M. MALARIK,)	
)	
Petitioner,)	Civil Action No. 08-740
)	
v.)	
)	Magistrate Judge Bissoon
KELLY LYNN CRAWFORD, <i>et al.</i> ,)	
)	
Respondents.)	

ORDER

James M. Malarik's Petition for Writ of Habeas Corpus was received by the Clerk of Court on May 29, 2008. He argues that his state court sentence for a violation of his probation is, in effect, a violation of Double Jeopardy since he has also been sentenced for the same offense in a separate criminal proceeding. A response to the petition from the District Attorney of Beaver County was due on or before July 22, 2008, but none has been filed. Malarik now seeks a default judgment (Doc. 26).

A respondent's failure to respond to a habeas petition does not relieve a petitioner of the burden of proving he is in custody in violation of the Constitution and that habeas relief is warranted. See Alder v. Burt, 240 F.Supp.2d 651, 677 (E.D.Mich.2003) (citing Allen v. Perini, 26 Ohio Misc. 149, 424 F.2d 134, 138 (6th Cir.), cert. denied, 400 U.S. 906, 91 S.Ct.

147, 27 L.Ed.2d 143 (1970)). Thus, the fact that a respondent fails to answer a habeas corpus petition is not grounds for granting federal habeas relief. See Gordon v. Duran, 895 F.2d 610, 612 (9th Cir.1990) ("The failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment."); Aziz v. Leferve, 830 F.2d 184, 187 (11th Cir.1987) ("a default judgment is not contemplated in habeas corpus cases"); Allen, 424 F.2d at 138.

AND NOW, this 9th day of September, 2008,

IT IS HEREBY ORDERED that the Motion for Default Judgment (Doc. 26) is DENIED.

IT IS FURTHER ORDERED that the District Attorney of Beaver County shall respond to the instant petition on or before September 23, 2008.

s/Cathy Bissoon
CATHY BISSOON
UNITED STATE MAGISTRATE JUDGE

cc:
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